

# BOARD OF ZONING APPEALS

## MINUTES

**6:30 PM**

**November 16, 2011**

**City Council Chambers**

**MEMBERS PRESENT:** Bernie Bossio, Leanne Cardoso, Jim Shaffer, George Papandreas, Tom Shamberger

**MEMBERS ABSENT:** None

**STAFF:** Heather Whitmore Dingman, AICP, Christopher Fletcher, AICP

**I. CALL TO ORDER AND ROLL CALL:** Bossio called the meeting to order at 6:30 p.m.

**II. MATTERS OF BUSINESS:** Approval of October 19, 2011 hearing minutes: Shamberger made a motion to approve the October 19, 2011 minutes, as presented; seconded by Papandreas. Motion carried four-zero, with Cardoso abstaining due to her absence of the October 19, 2011 Board of Zoning Appeals Meeting.

**III. OLD BUSINESS:** Dingman stated that her office received a request, via email, from Jerry Dixon, requesting that case CU11-10 (Old Business) remain on the table. Since item was tabled at the last meeting, no motion was required.

**IV. NEW BUSINESS:**

Dingman stated that her office received a request, via email, from Jerry Dixon, requesting that cases V1134-36 be postponed.

Shamberger made a motion to postpone V11-34, at the request of the petitioner; seconded by Shaffer. Motion carried unanimously.

Shamberger made a motion to postpone V11-35, at the request of the petitioner; seconded by Shaffer. Motion carried unanimously.

Shamberger made a motion to postpone V11-36, at the request of the petitioner; seconded by Shaffer. Motion carried unanimously.

**D. CU-11-13 / Tera, LLC / 388-404 Stewart Street:** Request by Project Management Services, on behalf of Tera, LLC, for conditional use approval of a ~~%~~Multi-family Dwelling+use at 388, 400, 404 Stewart Street; Tax Map 20, Parcel 372, 372.01, 373; R-2, Single and Two-Family Residential District.

Dingman read the Staff report, stating that the petitioner seeks to raze three structures at 388-404 Stewart Street and construct a multi-family housing development with required parking. Table 1331.05.01 ~~%~~Permitted Land Uses+ provides that multi-family dwelling uses in the R-2 District require conditional use approval by the Board of Zoning Appeals. Addendum A of this report illustrates the location.

The petitioner's proposed development program details include:

- Four story apartment building with four habitable levels.
- Twenty, one-bedroom units.
- Twenty on-site parking spaces located to the rear of the building accessed by a shared private drive from Stewart Street, which will eliminate three to four existing curb cuts along the heavily traveled corridor.
- Access to the dwelling units fronting Stewart Street from the rear parking area will be provided by two stairwells along the northern and southern exterior walls of the building.
- The building will utilize a shared dumpster facility located in the rear yard of the development, adjacent to the resident parking lot.
- Residents will use a shared mailbox unit placed along Stewart Street. The petitioner has confirmed in writing that the United States Postal Service will deliver mail to accessible units as needed.

The following Planning and Zoning Code related approvals are required for the development program as proposed.

Planning Commission:

- Case No. S11-20-III ..... Development of Significant Impact Site Plan.  
(approved November 10, 2011)
- Case No. MNS11-21 ..... Minor subdivision to combine three existing parcels.  
(approved November 10, 2011)

Board of Zoning Appeals:

- Case No. CU11-13 ..... Conditional use approval for a Multi-family Dwelling+ use in the R-2 District.
- Case No. V11-41 ..... 2.5 foot variance relief from the minimum front setback standard of ten feet.
- Case No. V11-43 ..... 1.5 story and 7.5 foot variance relief from the maximum building height standard of 2.5 stories or 35 feet, whichever is less.

As a reminder, on April 20, 2011 the Board of Zoning Appeals approved a similar conditional use petition (CU11-05) for Tera, LLC to allow a fifteen (15) one-bedroom residential development just north of the subject site.

Bossio introduced the petitioner, Lisa Mardis, Project Management Services, 1165 Hampton Avenue, who stated that this is Phase II of the project . Phase I was approved in April 2011 and is currently under construction.

Bossio opened the public hearing portion of the meeting, asking if anyone was present to speak in favor of the request. There being no comments in favor, he then asked if anyone was present to speak in opposition to the request.

Charlie Byrer, 420 Raymond Street, representing the Wiles Hill Neighborhood Association, referred to a letter written by the president of the association, Richard Dumas, pointing out that Finding of Fact #4 states that there will be adverse affects on the land-use of the neighborhood and surrounding properties. Byrer stated that this is located at the ~~gateway~~to the Wiles Hill neighborhood and would be setting a precedent. If this is approved, similar buildings would be built along Stewart Street and adversely affect the quality of life for the Wiles Hill residential community.

Bossio asked Mr. Byrer why the neighborhood association did not speak out in April when the first phase was up for consideration. Byrer stated that he was not personally aware that this request was being presented. Bossio stated that the same notification procedures were followed before the first request, and does not understand why it is a great concern now, but not in April.

Papandreas asked Mr. Byrer if his primary concern was the conditional use or the proposed height of the structure. Byrer answered that this type of building should be built in an R-3 Zoning district and he is primarily concerned about the setback and the height of the building, which is out of the norm.

William Blosser, 127 Willowdale Road, agreed with Mr. Byrer's statements, and said he also feels that this building is out of place for the neighborhood and will adversely affect the quality of life for the residents. Bossio asked Mr. Blosser why opposition was not expressed back in April. Mr. Blosser stated that he did not receive a notice because he was not within the 200 feet area.

Matthew Cross, 524 Milford Street, emphasized that developers should meet with neighborhood groups before planning large projects. He applauded Mr. Bossio for doing so in the Suncrest area. He also urged the BZA members to consider the impact of the construction (noise and congestion) for the residents, as well as long-term effects of having a building so large in this area. He is concerned about the specific impact of the height of the building, due to it being located at an intersection. He feels it will inhibit light and does not fit with the character of the neighborhood. He also expressed concern for pedestrian safety on the sidewalk, and he is very opposed to the 7.5 feet setback.

Bossio clarified that the setback requirement is 10 feet The request is for a variance of 2.5 feet, making the setback 7.5 feet

There being no further comments in opposition, Bossio declared the public hearing portion closed.

Dingman read Staff recommendation, stating that, the proposed redevelopment appears to be consistent with the character and street face of the east side of the Stewart Street corridor. The new building will complete a three-part, multi-family housing complex to create a consistent and interconnected development along this segment of Stewart Street.

The building provides all necessary parking places and driveways, as well as loading and trash receptacle areas. Furthermore, the proposed building exceeds required aesthetic requirements in the R-2 District by incorporating a combination of masonry materials, which will provide visually appealing qualities to this area.

The Board of Zoning Appeals must determine whether the proposed request meets the standard criteria for a conditional use by reaching a positive determination for *each* of the

~~Findings of Fact~~ Staff recommends revisions to the petitioner's ~~Findings of Fact~~ in Addendum B of this report (deleted matter struck through and new matter underlined).

Staff recommends approval of the conditional use as requested with the following conditions:

1. That the related minor subdivision final plat (Case No. MNS11-21), with associated access easements, must be recorded at the Monongalia County Courthouse prior to the issuance of a permanent Certificate of Occupancy.
2. That the development must meet all applicable federal Fair Housing and Americans with Disabilities Act standards as determined by the City's Chief Building Code Official.
3. That the petitioner shall incorporate, to the satisfaction of the Planning Division, all reasonable Technical Review Team recommendations in plans submitted with related building permit applications.
4. That the final Landscaping Plan and Lighting Plan must be submitted and approved as a part of the building permit review process and comply with related standards in Article 1367 and Article 1371 respectively unless variance relief is granted by the Board of Zoning Appeals.
5. That, to the satisfaction of the Planning Division, evergreen shrubs shall be planted along the entire front of the proposed structure to screen the partially exposed level from streetscape view.
6. That all exterior stairs, steps, landings, elevated walkways, railings, and support members may not be comprised of exposed wood or treated lumber.
7. That the shared dumpster shall be enclosed with masonry materials at least six (6) feet in height and include an opaque gate, standard concrete access apron, and concrete bollards at the rear of the enclosure to protect same from damage.

That any sidewalk or portion thereof along the project site's Stewart Street frontage damaged or destroyed during construction shall be replaced to the satisfaction of the City Engineer prior to the issuance of a permanent Certificate of Occupancy.

Papandreas asked for clarification of what the Board is going to be voting on. Bossio stated that the issue is not setback requirements, but rather whether or not to allow a multi-family development in an R-2 District area.

Bossio stated that, since the Board approved the request in April (phase 1) for a multi-family structure, he now wonders, from a legal standpoint, how the Board could say they do not want it to be a multifamily.

Cardoso stated that she does not have a problem granting the Conditional Use. She stated that she has opinions on the setback and height of the building, but that is not what the Board is looking at with this request.

Papandreas stated that he was absent at the April meeting, but he supports preservation of the neighborhoods, and suggested that the Board needs to take impact on neighborhoods more seriously in the future.

Bossio agreed with Papandreas and further stated that, in the past several years, the City has taken greater strides toward reaching out to the public . with televised meetings, a new public information officer being hired by the City, etc.

Shaffer made a motion to approve the Findings of Facts, with underline and strikethroughs; seconded by Cardoso. Motion carried unanimously.

The Findings of Facts included in this motion are as follows:

**Finding of Fact #1** – Congestion in the streets is not increased, in that:

The development meets minimum off-street parking requirements. Access to the proposed parking area utilizes a shared driveway from Stewart Street, which will eliminate three to four existing driveway entrances thereby advancing access management improvements along the heavily traveled corridor. The City Engineer determined that a traffic impact analysis should not be required for the development's proposed residential density. Continued efforts to increase residential density where properly zoned; within walking distance of primary resident destination points; and, within a well-served transit corridor should serve to aid in relieving housing development demand in outlying areas of Monongalia County that appears to contribute to traffic congestion within the City of Morgantown.

**Finding of Fact #2** . Safety from fire, panic, and other danger is not jeopardized, in that:

The development will meet all related building and fire codes. The development plan appears to incorporate access and maneuvering planning for fire trucks and emergency vehicles within the rear parking area.

**Finding of Fact #3** . Provision of adequate light and air is not disturbed, in that:

Give the topography of Stewart Street, the proposed structure will be slightly taller than the adjacent multi-family structure.

**Finding of Fact #4** . Overcrowding of land does not result, in that:

Off-street parking requirements will be met for the proposed development. The proposed 2.5 foot front setback encroachment appears to be the result of the developer's efforts to plan for and accommodate requisite parking, fire truck maneuvering, and shared garbage dumpster at the rear of the building.

**Finding of Fact #5** . Undue congestion of population is not created, in that:

Requisite off-street parking will be developed and continued efforts to increase residential density where properly zoned; within walking distance of primary resident destination points; and, within a well-served transit corridor should serve to aid in relieving housing development demand in outlying areas of Monongalia County that appears to contribute to traffic congestion within the City of Morgantown.

**Finding of Fact #6** . Granting this request will not create inadequate provision of transportation, water, sewage, schools, parks, or other public requirements, in that:

The proposed development should not require public infrastructure, utilities, or service beyond that which is currently available within the immediate area.

**Finding of Fact #7** . Value of buildings will be conserved, in that:

The value of buildings should increase by redeveloping the subject property and adding new dwelling units within an area where single-family homes have been converted into student housing leaving much of the adjacent housing stock functionally obsolete.

**Finding of Fact #8** . The most appropriate use of land is encouraged, in that:

The building occupancy will be similar to that of other buildings along the east side of Stewart Street, which is predominately multi-family housing within walking distance to WVU's downtown campus and public transit lines.

Cardoso made a motion to approve CU11-13; seconded by Shamberger. Motion carried unanimously.

- E. V11-41 / Tera, LLC / 288-404 Stewart Street:** Request by Project Management Services, on behalf of Tera, LLC, for variance relief from Article 1337.04 as it relates to setbacks for property at 388, 400, 404 Stewart Street; Tax Map 20, Parcel 372, 372.01, 373; R-2, Single and Two-Family Residential District.

Dingman read the Staff report, stating that the petitioner seeks to raze three structures at 388-404 Stewart Street and construct a multi-family housing development with required parking. Addendum A of this report illustrates the location of the subject site.

To advance the Board's consideration of the subject variance petitions resourcefully, Staff submits a combined Staff Report. However, the subject variance petitions do not appear mutually dependent and should therefore be reviewed and considered by the Board separately. The Board may, without objection, combine the public hearings for the subject variance petitions.

The petitioner's proposed development program details include:

- Four story apartment building with four habitable levels.
- Twenty, one-bedroom units.
- Twenty on-site parking spaces located to the rear of the building accessed by a shared private drive from Stewart Street, which will eliminate three to four existing curb cuts along the heavily traveled corridor.
- Access to the dwelling units fronting Stewart Street from the rear parking area will be provided by two stairwells along the northern and southern exterior walls of the building.
- The building will utilize a shared dumpster facility located in the rear yard of the development, adjacent to the resident parking lot.
- Residents will use a shared mailbox unit placed along Stewart Street. The petitioner has confirmed in writing that the United States Postal Service will deliver mail to accessible units as needed.

**V11-41:**

Concerning Variance Petition V11-41, Article 1337.04 (1) provides a minimum front setback of ten feet for principal structures within the R-2 District. The proposed front setback is 7.5 feet, which requires variance relief of 2.5 feet. This is a 25% reduction in the required setback.

V11-43:

Concerning Variance Petition V11-43, Article 1337.06 (A) provides the following maximum building height for principal structures within the R-2 District:

The maximum height of a principal structure shall not exceed two and one-half (2.5) stories or thirty-five (35) feet, whichever is less, except as provided in Section+

Article 1329.02 provides the following definitions to assist in determining building height.

**BUILDING HEIGHT IN FEET .** The vertical distance measure from the lot ground level to the highest point of the roof for a flat roof, to the deck line of a mansard roof, and the mean height between eaves and ridges of gable, hip and gambrel roofs. On lots with topographic elevation changes, the lot ground level shall be constructed to mean the halfway point between the highest and lowest elevations of the building footprint. Building height calculation shall not include chimneys, spires, elevator and mechanical penthouses, water tanks, radio antennas, and similar projections.

**BUILDING HEIGHT IN STORIES .** The number of stories in a building measured vertically at the front elevation from the ground level to the top of the building vertically above that same point. For the purposes of determining building height, a basement shall not be considered a story.

**BASEMENT .** A space having one-half or more of its floor-to-ceiling height below the average level of adjoining ground.

The proposed building height calculated in feet, based on the mean height of the proposed gable roof, is:

$(\text{lowest vertical distance in feet} + \text{highest vertical distance in feet}) / 2 = \text{height in feet}$

OR

$(38 \text{ feet} + 47 \text{ feet}) / 2 = 42.5 \text{ feet}$

The proposed building height calculated in feet is therefore 42.5 feet, which requires a 7.5 foot variance. This is a 20% increase in the allowable building height calculated in feet. The proposed building height calculated by the number of stories is measured vertically at the front elevation along Stewart Street is four stories because the lowest habitable level with entrances from the rear of the building is not one-half or more below the average level of adjoining ground. As such, a variance of 1.5 stories is required for the development as proposed. This is a 60% increase in the allowable height in stories.

The following Planning and Zoning Code related approvals are required for the development program as proposed.

Planning Commission:

- Case No. S11-20-III.....Development of Significant Impact Site Plan  
(approved November 10, 2011)
- Case No. MNS11-21 .....Minor subdivision to combine three existing parcels  
(approved November 10, 2011)

### Board of Zoning Appeals:

- Case No. CU11-13 ..... Conditional use approval for a ~~%~~Multi-family Dwelling+use in the R-2 District.
- Case No. V11-41 ..... 2.5 foot variance relief from the minimum front setback standard of ten feet.
- Case No. V11-43 ..... 1.5 story and 7.5 foot variance relief from the maximum building height standard of 2.5 stories or 35 feet, whichever is less.

Bossio recognized the applicant, Lisa Mardis, 1165 Hampton Avenue, stated that she would like to take this opportunity to address some concerns raised by the Board members. In regards to the height of the building, she stated that, from the Stewart Street side, this building will only be about ½ story higher than the current (first) building. The purpose of the front setback variance is to allow the fire department necessary building access and turn around area. There will only be one access to all three buildings. She stated that, since there was no opposition to Phase I, they did not expect opposition to Phase II. She affirmed that Tera, LLC would be more than happy to meet with concerned citizens. She further stated that the developers have worked very hard to make the buildings aesthetic and feels that these buildings are much better than some of the existing ones and much better than the ones that were demolished.

Shaffer asked Mardis how much higher the roofline will be on the second building, as compared to the first. Mardis stated that there is already a building in between building #1 and building #2, so comparing the roofline to the second (existing) building it is only ½ story higher.

Papandreas asked what the setbacks are for most of the buildings along the street. Mardis answered that it varies anywhere from zero to ten feet.

Dingman said that she measured them on the aerial maps and they definitely vary in width.

Cardoso asked what the purpose of the existing Tera building was. Mardis said it is currently an 11 unit building. Mardis stated that Phase III will be a remodel of the existing building to make it look more like the newer ones.

Cardoso asked what the purpose is of the additional story on the new building. Mardis answered that because more than half of the first floor (basement) is exposed it is considered a story.

Bossio opened the public hearing portion of the meeting, asking if anyone was present to speak in favor of the request. There being no comments in favor, he then asked if anyone was present to speak in opposition to the request.

Charlie Byrer, 420 Raymond Street, thanked the Board for the clarification of the 7.5 feet setback and asked that it be stated more clearly in future Staff reports. He read a response from the neighborhood association, stating that they feel the close proximity to Stewart Street reduces the possibility of future enhancements. He does not agree with the reason for the setback being for fire trucks. He feels that the developer could reduce the size of the building in order to make more access room. He also said snow piling up on the sidewalks is still a major issue and it becomes a bigger problem when the buildings are so close to the street. He feels the Board needs to take the future picture of the Wiles Hill neighborhood into consideration. He feels that the Wiles Hill neighborhood offers the potential of ideal housing for new faculty



members coming into WVU. They will not want to live back to back to students. He also stated that the traffic congestion is a big concern.

Bossio asked Mr. Byrer how he felt about the first building being approved. Mr. Byrer stated that there was a lot going on back in April with the City elections, etc. and he is very sorry they were not aware. They would have had representation at the meeting to speak against the request, had they known.

Shaffer asked Byrer how he feels about the downtown developments drawing students away from the neighborhoods. Byrer answered that this building is an R-3 District building in an R-2 District and that it will have an impact on the stability of the R-2 District neighborhood.

Bossio asked if anyone else was present to speak in opposition to the request.

Matthew Cross, 524 Milford Street, addressed Shaffer's question that he feels that the larger downtown developments (Beechview) are designed to draw students away from nonstudent neighborhoods. He pointed out again pedestrian concerns, especially on Stewart Street. He also emphasized that these types of developments drastically alter the quality of living in residential neighborhoods and urges the Board to take that into consideration.

William Blosser, 127 Willowdale Road, stated that it would be good to have access to the buildings on both sides with projects like this. He would urge the Board to consider making the setback 25 feet in the future.

There being no further comments in opposition to the request, Bossio declared the public hearing portion closed.

Mardis stated that she has talked with the City Engineer and there are no plans to widen Stewart Street in the near future. She stated that the developer is more than willing to make a No Right Turn coming out of the development to funnel traffic toward downtown instead of in the neighborhood. She emphasized that this is not a development comparable to the Augusta or Beechview in that this development will only add five additional residents, compared to the preexisting duplexes on the site. She reiterated that this will be getting students out of the Wiles Hill neighborhood with the traffic plan.

Shamberger asked Mardis how many units were in the buildings that were taken down. She stated that they contained 15 beds in four duplexes. The units were originally old houses turned into multiple duplexes.

Bossio asked Mardis why the developer chose to go with 20 units, rather than the 15 units which existed before. Mardis stated that she could ask the developer to address that question.

Dave Robertson, contractor for the project, from Somerset, Pennsylvania, thanked the Planning Staff and Board for their consideration and that he has had good experiences working in Morgantown. He stated that the reason for making the development 20 units rather than 15 was to recover development cost for new construction. In regards to the fire truck access issue, he stated there is a dumpster in the back corner, which is part of the reason for the Variance request. Robertson stated that the access and drive isle are located as such to provide access for fire and garbage trucks to the dumpster. The setback of 7.5 feet was necessary to provide the required drive width.

Bossio suggested that changing the footprint of the building to make it smaller, would give the same result.

Papandreas asked if the dumpster were not there; would there still be an issue? Robertson answered that the dumpster had to be at that location.

Dingman read the Staff recommendation, stating that The Board of Zoning Appeals must determine whether the proposed request meets the standard criteria for a variance by reaching a positive determination for *each* of the ~~Findings of Fact~~. Staff recommends revisions to the petitioner's Findings of Fact in Addendum B of this report (deleted matter struck through; new matter underlined).

Staff recommends that a variance of 2.5 feet be granted from the minimum front setback standard for Case No. V11-41 as requested.

Further, Staff recommends that a variance of 7.5 feet and 1.5 stories be granted from the maximum building height standard for Case No. V11-43 as requested.

The board went through the Findings of Facts one by one. They are as follows:

**Finding of Fact #1** – There are exceptional or extraordinary circumstances or conditions applicable to this property or to the intended use, that generally do not apply to other properties or uses in the same vicinity, because:

The proposed front setback encroachment appears necessary to ensure requisite parking, vehicular drive aisle, fire truck cross-access and maneuvering, and the shared garbage dumpster facility at the rear of the building; particularly given the site's significant elevation drop from the front to rear.

Shamberger made a motion to approve the first Finding of Fact; seconded by Shaffer. Motion carried two in favor to three against. Papandreas, Cardoso, and Bossio voted against.

Papandreas feels it is a self-imposed problem. He does not understand why this setback is necessary when the footprint of the building could be reduced in size and the dumpster moved.

Cardoso agreed with Papandreas and stated that the developer appears to desire to have the building as large as possible.

Bossio asked Dingman what is exceptional about this request. She stated that the access and drive isle are located as such to provide access for fire and garbage trucks to the dumpster. The setback of 7.5 feet was necessary to provide the required drive width. Bossio replied that it is still being made exceptional because of the size of the building.

Dingman said the language could be revised to state that the proposed setback encroachment is not necessary.

Papandreas stated he does not feel that there are no exceptional or extraordinary circumstances because the variance request is not necessary.

Fletcher asked to expedite the process, Finding of Fact #1 should be rephrased as follows:

There are NO exceptional or extraordinary circumstances or conditions applicable to this property or to the intended use, that generally do not apply to other properties or uses in the same vicinity, the proposed front setback encroachment appears to be a self-imposed site planning hardship.

Papandreas made a motion to approve the rephrased Finding of Fact #1; seconded by Cardoso. Motion carried three in favor and two against. Shamberger and Shaffer voted against.

**Finding of Fact #2** . The variance is necessary for the preservation and enjoyment of a substantial property right that is possessed by other properties in the same vicinity and zoning district, but which denied to this property, because:

It appears that several of the structures along the east side of Stewart Street from the subject project site south to Yoke Street do not meet the minimum front setback requirement.

Bossio asked Dingman if there are other buildings in that area that do not meet minimum setback requirements.

Dingman said that she thinks there are several other buildings in that area that do not meet minimum setback requirements, however but she does not have specific historical knowledge to reference.

Fletcher suggested that the negative Findings of Fact be reconsidered to be found in the positive.

Cardoso made a motion to reconsider Finding of Fact #2; seconded by Shaffer. Motion carried unanimously.

Cardoso made a motion to find in the positive Finding of Fact #2; seconded by Shamberger. Motion carried unanimously.

**Finding of Fact #3** . The granting of this Variance will not be harmful to the public welfare and will not harm property or improvements in the vicinity and zoning district in which the subject property is located, because:

The proposed front setback appears to be consistent with the predominant front setback trend along the east side of Stewart Street and should have no adverse impact on adjacent public improvements or adjoining properties.

Shaffer made a motion to find Finding of Fact #3 in the positive; seconded by Shamberger. Motion carried unanimously.

**Finding of Fact #4** . The granting of this Variance will not alter the land use characteristics of the vicinity and zoning district, or diminish the market value of adjacent properties, or increase traffic congestion on public streets, because:

The proposed setback encroachment cannot contribute to nor mitigate existing traffic congestion; enables redevelopment within a corridor of functionality obsolete single-family homes that have been converted into two-and three-family dwelling units; and, continues R-2 District permitted multi-family redevelopment within close proximity to primary resident

destinations encouraging walking and use of public transit.

Shamberger made a motion to find Finding of Fact #4 in the positive; seconded by Shaffer. Motion carried unanimously.

Cardoso made a motion to deny V11-41; seconded by Papandreas. Motion carried three in favor to two against. Those voting against were Shaffer and Shamberger.

The Board agreed to go through the Findings of Fact for case V11-43 one by one:

**Finding of Fact #1** . There are exceptional or extraordinary circumstances or conditions applicable to this property or to the intended use, that generally do not apply to other properties or uses in the same vicinity, because:

The slope of Stewart Street across the site's frontage of approximately 7.5%; the slope of the site from the front along Stewart Street east to the rear property boundary; requisite site design accommodations for fire truck cross-access and maneuvering at the rear of the property; requisite accessible route design accommodations for accessible dwelling units in the lowest level; and a higher roof ridge resulting from the petitioner's desired 8:12 roof pitch to better reflect the character of the surrounding built environment all appear to result in a variance request of 1.5 stories rather than 0.5 stories and 7.5 feet rather than 4 feet or less.

Shaffer made a motion to find in the positive Finding of Fact #1. Motion failed for lack of a second.

Cardoso stated that there are no exceptional circumstances. The developer only desires to have a larger building.

Fletcher pointed out that at least 50% or more of the basement needs to be below grade. On the left side, it is exposed because that is the turn-around for the fire trucks.

After much discussion, Fletcher recommend that Finding of Fact #1 be rephrased in the negative as follows:

There are no exceptional or extraordinary circumstances or conditions applicable to this property or to the intended use, that generally do not apply to other properties or uses in the same vicinity, because the development program could be revised to comply with the maximum building height standards in the R-2 district.

Papandreas made a motion to find in the negative Finding of Fact #1, as rephrased; seconded by Cardoso. Motion carried four-one, with Shaffer voting against.

**Finding of Fact #2** . The variance is necessary for the preservation and enjoyment of a substantial property right that is possessed by other properties in the same vicinity and zoning district, but which denied to this property, because:

Stewart Street is at a grade of approximately 7.5% which makes structures with larger square footage more likely to be above grade, thus having a more exposed basement. The proposed structure will be slightly taller in height than the adjacent building and the approved Phase 1 project, which both set to the north or upper end of the project. It appears that the adjacent multi-family structure, also owned by Tera, LLC, if measured in stories,

would exceed the maximum height requirement. Likewise, the multi-family structure to the north of Phase 1 is three stories.

Shaffer made a motion to find Finding of Fact #2 in the positive. Motion failed for lack of a second.

Finding of Fact #2 was rephrased in the negative by Fletcher as follows:

The variance is no necessary for the preservation and enjoyment of a substantial property right that is possessed by other properties in the same vicinity and zoning district, but which denied to this property because there does not appear to be any other development within the immediate R-2 district area with a building height or scale as proposed.

Cardoso made a motion to find Finding of Fact #2 in the negative, as rephrased; seconded by Papandreas. Motion carried four-one, with Shaffer voting against.

**Finding of Fact #3** . The granting of this variance will not be harmful to the public welfare and will not harm property or improvements in the vicinity and zoning district in which the subject property is located, because:

The proposed building height encroachment appears to be reasonably consistent with the surrounding built environment within the Stewart Street corridor and should have no adverse impact on adjacent public improvements or adjoining properties.

Shaffer made a motion to find Finding of Fact #3 in the positive; seconded by Shamberger. Motion carried three-two, with Cardoso and Papandreas voting against.

**Finding of Fact #4** . The granting of this variance will not alter the land-use characteristics of the vicinity and zoning district, or diminish the market value of adjacent properties, or increase traffic congestion on public streets, because:

The proposed building height encroachment cannot contribute to nor mitigate existing traffic congestion; enables redevelopment within a corridor of functionally obsolete single-family homes that have been converted into two-and three-family dwelling units; and continues the R-2 District permitted multi-family redevelopment within close proximity to primary resident destinations encouraging walking and use of public transit.

Shaffer made a motion to find Finding of Fact #4 in the positive; seconded by Shamberger. Motion carried unanimously.

Shamberger made a motion to deny request V11-43; seconded by Papandreas. Motion carried four-one, with Shaffer voting against.

**G. CU11-14 / Larew / 1459 N. Willey Street:** This Agenda item was postponed at the request of the Applicant.

Shaffer made a motion to TABLE this request; seconded by Papandreas. Motion carried unanimously.

**H. V11-44 / Burger King / 340 Patteson Drive:** Request by Grant Warton, on behalf of Burger King, for variance relief from Article 1369 as it relates to signage at 340 Patteson Drive; Tax Map 10, Parcel 87; B-2, Service Business District.

Dingman read the Staff report, stating that Burger King Restaurant has nearly completed its substantial interior and exterior remodeling of their Patteson Drive location. The building will receive updated signage as a part of this enhancement project. Addendum A of this report illustrates the location of the subject site.

Article 1369.07 (I) (1) provides a maximum area of all wall signs on a building to 0.6 square feet per linear foot of tenant building frontage in the B-2 District.

The building frontage of the Burger King Restaurant is approximately 84 feet, which calculates to a maximum wall sign area of 50.4 square feet.

The petitioner has worked closely with the Planning Division over the last month to significantly reduce the extent of variance relief necessary to accommodate the Burger King® franchise signage requirements.

Originally the petitioner requested to place approximately 250.8 square feet of wall signage on the building, which would have required a 200.4 square foot variance.

The petitioner has since reduced the number and area of all wall signs to 87.8 square feet, which instead requires a 37.4 square foot variance.

Bossio introduced the applicant, Grant Warton, from Vienna, WV, who stated that the restaurant was built in 1988 and it was built far back from the road. At that time businesses were built closer to the road. This makes larger signage very important.

Bossio opened the public hearing portion of the meeting, asking if anyone was present to speak in favor of the request.

Matt Walker, also from Vienna, WV, stated that he is a partner with Mr. Warton and a Burger King Franchisee. He stated that part of the remodel project was to incorporate the classic BK Motto ~~Have it Your Way~~. He urged the Board to approve the signage request.

Bossio then asked if anyone was present to speak in opposition to the request. There being no comments in opposition, Bossio declared the public hearing portion closed.

Dingman read the Staff recommendation, stating that The Board of Zoning Appeals must determine whether the proposed request meets the standard criteria for a variance by reaching a positive determination for *each* of the ~~findings~~ of Fact+submitted by the petitioner.

Addendum B of this report provides Staff recommended revisions to the petitioner's findings of fact (deleted matter struck through; new matter underlined).

Staff recommends that the Board grant a variance of 37.4 square feet from the maximum wall sign area for V11-44 as requested.

Papandreas made a motion to approve the Findings of Facts for V11-44; seconded by Shamberger. Motion carried unanimously.

The Findings of Fact included in this motion are as follows:

**Finding of Fact #1** – There are exceptional or extraordinary circumstances or conditions applicable to this property or to the intended use, that generally do not apply to other properties or uses in the same vicinity, because:

The existing setback of the Burger King Restaurant appears to be significantly greater than the majority of restaurants within the Patteson Drive corridor.

**Finding of Fact #2** . The variance is necessary for the preservation and enjoyment of a substantial property right that is possessed by other properties in the same vicinity and zoning district, but which denied to this property, because:

The majority of wall signage within the Patteson Drive corridor appears to exceed the maximum wall sign area standard. Similar variance relief was granted on June 16, 2010 by the Board of Zoning Appeals for the University Avenue McDonald's Restaurant location.

**Finding of Fact #3** . The granting of this variance will not be harmful to the public welfare and will not harm property or improvements in the vicinity and zoning district in which the subject property is located, because:

The significantly revised wall sign plan as a part of the nearly completed exterior renovations should enhance the pleasing look of the commercial area and contribute to commerce activity and continued private economic investment.

**Finding of Fact #4** . The granting of this variance will not alter the land-use characteristics of the vicinity and zoning district, or diminish the market value of adjacent properties, or increase traffic congestion on public streets, because:

The significantly revised wall sign plan appears to improve the site's capacity to observe desired signage design and performance standards in the B-2 District. The existing land use characteristics of the subject site will remain the same, an internationally recognized fast food restaurant. Variances in relation to wall signage cannot contribute to nor mitigate existing traffic volumes on neighboring streets.

Papandreas made a motion to approve request V11-44; seconded by Shamberger. Motion carried unanimously.

- I. **CU11-12/Doodles Hot Spot/100 Hartman Run Road:** Request by Alisha Maidens on behalf of Doodles Hot Spot, for conditional use approval of a %Private Club+ use at 100 Hartman Run Road; Tax Map 31, Parcel 16; B-2, Service Business District.

Dingman read the Staff report, stating that the petitioner seeks to convert a pre-existing, nonconforming, grandfathered Video Gaming Establishment from a %Tavern+ use to a %Private Club+ use. Addendum A of this report illustrates the location of the subject site.

Article 1329.02 defines %Tavern+as:

%A place licensed to sell only beer and wine, but no liquor. Food may or may not be served. Taverns are allowed in all districts except residential and office districts.+

Article 1329.02 defines %Private Club+as:

%Any corporation or unincorporated association meeting the definition of private club as contained and utilized within the Code of West Virginia Chapter 60, Article 7, Section 1 et seq. as the same applies to licensing for sale of alcoholic liquor. These establishments are permitted to sell liquor, beer and wine.+

Table 1331.05.01 %Permitted Land Uses+provides that %Tavern+uses are permitted in the B-2 District by-right and %Private Club+uses are permitted by conditional use approval.

Therefore, in order to serve liquor, Doddles Hot Spot must obtain conditional use approval as a %Private Club+.

The petitioner has advised Staff that the benefit of obtaining a conditional %Private Club+use approval from the City and associated liquor licensing from the State enables the establishment to avoid complying with West Virginia State Code 29-22B-328 of the Limited Video Lottery Act, which requires a limited video lottery retailer license holder who does not have a private club liquor license to derive at least forty percent of its gross receipts from the sale of beer.

Section 1331.06 (18) provides that:

%When reviewing new or the conditional use Private Club applications, the Board of Zoning Appeals shall consider potential adverse impacts on surrounding residential properties such as, but not limited to, the arrangement and use of outdoor seating areas, hours of wine and liquor sales, noise, etc.+

According to the petitioner, no exterior or interior modifications are presently proposed nor will outdoor seating be pursued. Therefore, noise at this location is not anticipated to be a problem.

Hours of operation will be Monday through Friday from 7am to 3am, Saturday from 7am to 2:30am, and Sunday from 1pm to 3am.

The business employs one person at a time and hosts five lottery machines. Existing parking exceeds minimum off-street parking requirements.

In summary, the Lottery Establishment use is preexisting and the Private Club designation is not inconsistent with the existing use or character of the area. Addendum A of this report illustrates the site's location.

Bossio introduced the applicant. Alisha Maidens, 2668 Fairmont Road, Morgantown, stated that she would like to emphasize that the main reason that they are requesting the private club permit is comply with State requirements. If they go with a private club rather than a tavern, they will not have to show that 40% of their gross income is from beer sales. She stated that they are a very small establishment and not everyone who comes in drinks beer.



Bossio asked Ms. Maidens to clarify that, as a state-regulated video lottery tavern, 40% of sales must be beer sales. Ms. Maidens said yes, that is the case.

Papandreas asked if all those requirements go away if they hold a liquor license. Ms. Maidens stated that yes, if they change to a private club with a liquor license, that is the case.

Bossio opened the public hearing portion of the meeting, asking if anyone was present to speak in favor of the request. There being no comments in favor, Bossio then asked if anyone was present to speak in opposition to the request.

Kimberly Hogan, 1326 Montrose Avenue, Morgantown, stated that her property goes down to Mineral Street and she was not notified when the establishment became a Hot Spot, but she was notified about this change. She stated that this is not conducive to the residential neighborhood. She expressed concern the as a private club could have nudity.

Bossio clarified that the term ~~%private club+~~ use refers strictly to an establishment with a liquor license, and in no way indicates that there will be nudity permitted.

There being no further comments in opposition, Bossio declared the public hearing portion closed.

Dave O~~N~~Neal, manager of Doodles, wanted to assure Ms. Hogan that there are no intentions to host nudity at this establishment. He further stated that it will basically continue to be the same type of establishment as it was before, under the same owner.

Bossio asked Mr. O~~N~~Neal if the request would be approved to allow them to operate as a private club, would the sale of liquor be mandatory. Mr. O~~N~~Neal stated that he did not believe they had to, but it would be favorable for them to do so, to compete with other businesses.

Dingman read the Staff recommendation, stating that in the opinion of the Planning Division the sale of liquor in addition to beer and wine within the grandfather Video Lottery Establishment will have no appreciable change in the character of the establishment or the surrounding commercial area.

The Board of Zoning Appeals must determine whether the proposed request meets the standard criteria for a variance by reaching a positive determination for *each* of the ~~%findings of Fact+~~as submitted by the petitioner.

With the exception of striking the last sentence in the petitioner's Finding of Fact No. 7, Staff concurs with the petitioner's findings of fact and recommends approval of CU11-12 as requested with the following conditions:

1. That no exterior seating or gathering space may be developed without the approval of the Board of Zoning Appeals.
2. That all regulated signage for the subject establishment must comply with related standards set forth in Article 1369 ~~%Signs+~~

3. That the conditional use approval granted herein is specific to the petitioner and may not be transferred.

Bossio asked Dingman if it was permissible in all B-2 District areas to obtain a conditional use for a private club license. Dingman answered that it is.

Papandreas made a motion to approve the Findings of Fact for CU11-12; seconded by Cardoso. Motion carried unanimously.

The Findings of Fact included in this motion are as follows:

**Finding of Fact #1** . Congestion in the streets is not increased, in that:

The new business is not physically altering the existing entrance/exit of the existing parking area and will be conducting the same type of business as the previous occupant.

**Finding of Fact #2** . Safety from fire, panic, and other danger is not jeopardized, in that:

No changes have been made to the existing structure and surrounding property.

**Finding of Fact #3** . Provision of adequate light and air is not disturbed, in that:

No changes or additions have been made to the existing structure and/or property.

**Finding of Fact #4** . Overcrowding of land does not result, in that:

No changes or additions have been made to the existing structure and/or property.

**Finding of Fact #5** . Undue congestion of population is not created, in that:

No changes have been made to the existing structure and/or property and business conducted therein is the same as the previous occupant of the location and will not include a residential component.

**Finding of Fact #6** . Granting this request will not create inadequate provision of transportation, water, sewage, schools, parks, or other public requirements, in that:

No changes have been made to the existing structure and/or property. No changes in use or additions to the building that would cause an increase in public services.

**Finding of Fact #7** . Value of buildings will be conserved, in that:

The building will be used for new business.

**Finding of Fact #8** . The most appropriate use of land is encouraged, in that:

The land will continue to be utilized for a business in a heavily traversed commercial corridor.

Papandreas made a motion to grant CU11-12 with staff conditions; seconded by Cardoso. Motion carried unanimously.

- J. **CU11-15/J&J Towing/1385 Greenbag Road:** Request by Jody Hunt, on behalf of J&J Towing, for conditional use approval of a %Wrecker Service+ use at 1385 Greenbag Road; Tax Map 31, Parcel 101.9; B-2, Service Business District.

Dingman read the Staff report, stating that the petitioner seeks to establish a %Wrecking Service+ use at the subject location, which is the former Chippy% Transmission site. The applicant currently operates a towing operation in Westover and seeks to expand his business by establishing an operation in Morgantown. Addendum A of this report illustrates the location of the subject site.

Article 1329.02 defines %Wrecking Service+as:

%A service for towing wrecked, illegally parked, or disabled automobiles or freeing automobiles stalled in snow or mud.+

Table 1331.05.01 %Permitted Land Uses+provides that %Wrecking Service+uses are permitted in the B-2 District with conditional use approval by the Board of Zoning Appeals.

The proposed vehicle impoundment area will be to the rear and western side of the existing building.

It is the opinion of the Planning Division that several site improvements and performance standards, which are recommended as conditions below, are necessary to mitigate potential impacts by the proposed wrecker service on surrounding properties, public rights-of-way, and the adjoining rail-trail facility.

Bossio introduced the applicant. Jody Hunt, owner of J & J Towing, 100 Dunkard Avenue, Morgantown stated that they are looking to expand their business in the Morgantown area. He stated that they would have to fence in the impoundment area, per State requirements. He submitted a drawing of the type of mesh fencing they would use. The opening to the rail trail would have to be closed off, but he stated that any business that would use the building and site would likely need to close the access to the rail trail. There is another access to the rail trail about 25 yards further up the trail. He stated it is not their intention to do anything to jeopardize the quality of life for the public. Most cars are there no longer than a week. The ones that sit longer will be behind the screened area.

Bossio asked if the trail property goes through the property. Hunt answered that the trail itself is not on the property.

Bossio opened the public hearing portion of the meeting, asking if anyone was present to speak in favor of the request. There being no comments in favor, Bossio then asked if anyone was present to speak in opposition to the request.

Louis Scotchel, owner of Classics Restaurant, 1384 Green Bag Road, expressed concern about closing the pedestrian access way to the rail trail, which is his property% access to the rail/trail. He said it took about six months to get that opening. He is concerned that the fencing will limit the visibility of his restaurant. He is also not sure that the facility is currently set up for the type

of business that they are intending to use it

Bossio asked for clarification from Mr. Scotchel that he is not opposed to what Mr. Hunt wants to do, he is just opposed to the fence blocking the access.

Bossio asked if anyone else was present to speak in opposition to the request. There being no comments in opposition, Bossio declared the public hearing portion closed.

Bossio opened the rebuttal portion for Mr. Hunt. Mr. Hunt stated that there is an opening to the rail trail in between the car wash and the building, with a grassy area and feels that will provide adequate access to the rail trail. He stated that he does not wish to do anything that would diminish Mr. Scotchel's business, nor does he wish to put up the fence, but he is required to.

Dingman read Staff recommendation, stating that the Board of Zoning Appeals must determine whether the proposed request meets the standard criteria for a conditional use by reaching a positive determination for *each* of the findings of Fact+submitted by the petitioner.

Staff recommends that should the subject conditional use be approved, the following conditions be included:

1. That the opening at the northwest corner of the existing chain-link fence separating the rear of the subject site from the adjoining rail-trail facility must be closed to ensure that pedestrians do not wonder from the rail-trail facility into the proposed impoundment area.
2. That the existing chain-link fence running along the rail-trail facility must be covered the length of the rear fence line as well as the northeast fence return to the existing building thereby screening the view of the impoundment area from the rail-trail facility. Said screening must be at least 85% - 88% opacity knitted polyethylene or similar design material. Said screening material must be continuously secured, maintained, and remain in working order so that the objective to screen the impoundment area is achieved.
3. That a solid opaque fence and related gate(s), beginning at grade and extending vertically at least six (6) feet in height, must be constructed along the front and enclose the impoundment area to completely screen the view of same from the frontage right-of-way and adjoining properties. The fence must be constructed of wood, vinyl, or similar material. Said fence may not be used for the placement of temporary or permanent signage. If said fence is constructed of wood, it must be completely painted one solid color to reasonably match the existing building.
4. That the solid opaque fence along the front enclosing the impoundment area may not extend closer to the frontage street than the building line of the existing structure.
5. That the site improvement related conditions set forth above must be completed to the satisfaction of the Planning Division prior to the issuance of any certificate of occupancy.
6. That towed vehicles may not be unloaded or placed, either temporarily or permanently, outside the enclosed impoundment area.
7. That all exterior and interior premises shall be maintained in a clean, sanitary, and neat condition so that rats, vermin, odors, and fire hazards are not created.

8. That the accumulation of anything other than the temporary storage of wrecked vehicles shall not be permitted.
9. That the operation of the wrecking service may not result in the establishment of a junkyard+use as defined in Article 1329.02 of the Planning and Zoning Code.
10. That the conditional use approval granted herein is specific to the petitioner and may not be transferred.

Cardoso said that with ten conditions attached to Staff recommendation, it would appear that there are too many things contingent upon making this conditional use work. She stated that she's having trouble visualizing this fence area and what it would be like to view it from Classics.

Bossio questioned whether this proposed use would be the highest and best use of a B-2 property. He stated that he would like to see Mr. Hunt prosper and grow his business, but he questions whether this is the proper location for that.

The Board went through the each Findings of Fact on an individual basis, and asked staff to provide both a positive and a negative response based on board direction:

**Finding of Fact #1** – Congestion in the streets is not increased, in that:

No I would not believe so.

Bossio asked Dingman for a Finding of Fact in the negative, Staff recommended:

Congestion in the streets WILL increase, in that the location of the impoundment area and its entrance may congest and delay traffic flow through the Greenbag Road and Deckers Creek Blvd intersection. Of particular concern is the limited area available necessary for the maneuvering of towing trucks without substantially obstructing the public right-of-way.

Shaffer made a motion to find Finding of Fact #1 in the negative; seconded by Papandreas. Motion carried four-one; with Shamberger voting against.

**Finding of Fact #2** . Safety from fire, panic, and other danger is not jeopardized, in that:

The proposed use must comply with the fire and building code.

Papandreas made a motion to find Finding of Fact #2 in the positive; seconded by Cardoso. Motion carried unanimously.

**Finding of Fact #3** . Provision of adequate light and air is not disturbed, in that:

The impoundment area is not an enclosed building, so it will not impact light and air as would a building mass. Rather, it is completely enclosed behind an opaque fence that will allow air flow and some light penetration, while still screening the wrecked vehicles.

Shaffer made a motion to find Finding of Fact #1 in the negative; seconded by Papandreas. Motion carried four-one; with Bossio voting against.

**Finding of Fact #4** . Overcrowding of land does not result, in that:

This is an automobile-oriented reuse of an existing structure that was once used for an automobile-oriented use. It appears that the site has adequate parking and drive area to accommodate impounded, towing, and customer vehicles.

Shamberger made a motion to find Finding of Fact #4 in the positive; seconded by Shaffer. Motion carried unanimously.

**Finding of Fact #5** . Undue congestion of population is not created, in that:

The proposed conditional use request does not contain a residential component.

Papandreas made a motion to find Finding of Fact #5 in the positive; seconded by Shamberger. Motion carried unanimously.

**Finding of Fact #6** . Granting this request will not create inadequate provision of transportation, water, sewage, schools, parks, or other public requirements, in that:

The building already exists and has adequate provision of transportation, water, sewage. The proposed development should not require public service beyond that which is currently available within the immediate area.

Shamberger made a motion to find Finding of Fact #6 in the positive; seconded by Cardoso. Motion carried four-one; with Bossio voting against.

**Finding of Fact #7** . Value of buildings will be conserved, in that:

The Greenbag Road and Earl Core/Route 7 Corridor is heavily automobile-oriented. This building was previously used as an automobile-oriented use. This segment of Greenbag Road is largely mixed industrial and intense commercial. This use appears to be compatible will surrounding uses and will be operated in a manner that will conserve the value of the buildings in the area.

Shaffer made a motion to approve Finding of Fact #7 in the positive. Motion failed for lack of a second.

Cardoso requested staff to read Finding of Fact#7 in the negative, staff recommended:

The proposed use will not add aesthetic character or significant economic development potential to the location. Surrounding businesses would gain more value from a more customer driven use, which has less impact on the surrounding properties.

Cardoso made a motion to find Finding of Fact #7 in the negative; seconded by Papandreas. Motion carried four-one; with Shaffer voting against.

**Finding of Fact #8** . The most appropriate use of land is encouraged, in that:

The Greenbag Road and Earl Core/Route 7 Corridor is heavily automobile-oriented. This building was previously used as an automobile-oriented use. This segment of Greenbag

Road is largely mixed industrial and intense commercial. There are limited locations in the City with similar zoning and similar surrounding uses. Given the overall land use distribution in Morgantown, and the land uses on this corridor, this appears to be an appropriate location for a wrecking service.

Cardoso requested staff to read Finding of Fact#7 in the negative, staff recommended:

The B-2 zoning provides for numerous business services uses. Towing and wrecking service is only one option available. Other uses may be more appropriate for this site. The proposed use is not consistent with surrounding business uses, such as restaurant, retail, and distribution.

Cardoso made a motion to find Finding of Fact #8 in the negative; seconded by Papandreas. Motion carried four-one; with Shaffer voting against.

Papandreas made a motion to deny CU11-15; seconded by Shamberger. Motion carried unanimously.

**V. OTHER BUSINESS:**

**A.** Public Comments: None

**B.** Staff Comments: None

**VI. ADJOURNMENT: 9:47 PM**

MINUTES APPROVED:

December 21, 2011

BOARD SECRETARY:

  
Christopher M. Fletcher, AICP